No. 89-1821

In the Supreme Court of the United States

OCTOBER TERM, 1990

CHARLES Z. STEVENS, III, PETITIONER

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the timely filing of a notice of intent to sue is sufficient to preserve district court jurisdiction under Section 633a(d) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, even after a claim for administrative relief under Section 633a(b) has been properly dismissed as untimely.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A5-A8) is unreported. The decision of the district court (Pet. App. A1-A4) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1990. The petition for a writ of certiorari was filed on May 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, provides two separate routes by which a federal employee who is at least

40 years of age and believes he has been discriminated against because of his age can obtain relief. First, the employee may file an administrative claim in accordance with rules and regulations promulgated by the Equal Employment Opportunity Commission (EEOC) and the employing agency. 29 U.S.C. 633a(b). The employee following this route first seeks counseling from an Equal Employment Opportunity counselor at the employing agency. 29 C.F.R. 1613.213. The counseling must be sought within 30 calendar days of the alleged discriminatory event, the effective date of the allegedly discriminatory personnel action, or the date that the employee knew or reasonably should have known of the discriminatory event or personnel action. 29 C.F.R. 1613.214(a)(i). If the matter cannot be resolved to the employee's satisfaction, he must be advised in writing that he has the right to file a formal complaint with the agency. 29 C.F.R. 1613.213(a). That complaint must be filed within 15 calendar days after the employee receives notice of his right to file such a complaint. 29 C.F.R. 1619.214.[1]

If the agency denies the complaint, the employee may then appeal to the EEOC. 29 C.F.R. 1613.215; 29 C.F.R. 1613.231.The notice of appeal must be filed within 20 calendar days after receipt of the agency's notice of final decision. After the administrative complaint is filed with the EEOC, the employee may at any time decide that he

[1] The agency shall extend the time limits for seeking counseling or filing a complaint if the aggrieved person shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; the time limits may also be extended for other reasons considered sufficient by the agency. 29 C.F.R. 1613.214(a)(4).

wishes to abandon the administrative process in favor of a civil suit. The filing of a civil action automatically terminates the processing of the administrative complaint. 29 C.F.R. 1613.513.

Alternatively, the employee may bring a civil action in any federal district court of competent jurisdiction without pursuing his administratvie remedies at all. The ADEA provides that "[w]hen the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice." 29 U.S.C. 633a(d).

2. Petitioner was employed by the Internal Revenue Service until August 16, 1986, at the GS-6 grade level. On August 17, 1986, he became a GS-7 Revenue Officer in Training. On April 26, 1987, while still in the probationary period, petitioner was asked to resign from the Revenue Officer training program; he returned to his previous grade level. On May 21, 1987, petitioner wrote a letter to his Congressman in which he stated his belief that age had been a determining factor in the request that he resign from the training program (Pet. App. A2, A6), but he did not request an interview with an EEO counselor until September 24, 1987, more than 30 days after the resignation request. An interview was held five days later.

On October 19, 1987, petitioner filed a complaint with the Treasury Department, his employing agency, alleging that the April 26, 1987, employment decision involved discrimination in violation of the ADEA. Pet. App. A2, A6. At the bottom of that complaint, petitioner stated that "[t]his is also my notice of intent to sue in U.S. Civil District Court if the matter is not satisfactorily resolved." CX 4.

On December 3, 1987, the agency rejected the complaint as untimely. CX 2. It recognized that although 29 C.F.R. 1613.215 requires a complainant to contact an EEO counselor within 30 days of the allegedly discriminatory action, that time limit may be extended if the complainant demonstrates good cause to do so. *Ibid.*; 29 C.F.R. 1613.214. The agency concluded, however, that petitioner had not provided adequate justification for his failure to contact an EEO counselor until 151 days after the allegedly discriminatory action had occurred. CX 2.

Petitioner thereupon appealed to the EEOC, which affirmed the agency's decision in an order dated March 30, 1988. CX 1. It found that, although petitioner was aware of the alleged discrimination at least by May 21, 1987 (the date of his letter to his Congressman), he failed to seek counseling until September 24, 1987—well beyond the 30-day time limit. The EEOC agreed with respondent that petitioner had not offered adequate justification for extending the time limit.

3. On May 4, 1988, petitioner filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the ADEA. Pet. App. A5-A7. The Department of the Treasury and James M. Baker, III, the Secretary of the Treasury, were named as defendants. Petitioner alleged that "[b]ecause of [petitioner's] age of 63 years, Defendants failed to promote [petitioner] and forced [petitioner] to request reduction to a lower grade of employment under threat of dismissal from employment." Compl. para. 8. Petitioner did not assert jurisdiction based on Section 633a(d) of the ADEA.

After a bench trial, the district court issued an order dismissing the case with prejudice for lack of jurisdiction. Pet. App. A1-A4. Although the court recognized that, under the ADEA, a person who believes that he has been discriminated against on the basis of age has two avenues

of relief, it apparently assumed that petitioner's failure to initiate a judicial action within 180 days of the alleged discriminatory action foreclosed his use of the direct judicial review route. Pet. App. A3. It ruled that the EEOC had properly rejected petitioner's administrative claim, because petitioner had not initiated his EEO grievance by seeking counseling within the required 30-day period, nor had he identified sufficient equitable grounds to justify tolling the running of that period. Pet. App. A3-A4.

4. The court of appeals affirmed, but with a different rationale. It correctly observed that the 180-day time limit of 29 U.S.C. 633a(d) applies to the filing of a notice of intent to sue with the EEOC—not the filing of a civil suit, as the district court believed. Pet. App. A6-A7. The court then found that the statement at the bottom of petitioner's October 19, 1987, complaint to his employing agency could serve as timely notice to the EEOC. The court nevertheless held that the notice was not "effective" because petitioner did not file his law suit until May 4, 1988. Pet. App. A7.

ARGUMENT

1. Petitioner contends for the first time in this Court that, although he did not timely pursue his administrative remedies, the district court had jurisdiction over his claim because he complied with 29 U.S.C. 633a(d) by filing a timely notice of intent to sue with EEOC. This Court does not ordinarily address questions that have not been properly presented to the courts below. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). There is no reason to depart from that practice here.

Petitioner's complaint portrayed the case as simply an appeal from an unfavorable EEOC decision.[2] It did not

[2] For example, he alleged that he "did not know of the procedures or a rule that required a charge to be lodged with an EEO Counselor

assert Section 633a(d)'s "notice of intent to sue" provision as the jurisdictional basis for the suit; indeed, it did not even refer to the "notice" contained in petitioner's administrative complaint of October 19, 1987.[3] In these circumstances, the district court naturally focussed on the administrative record and properly concluded that petitioner had not timely pursued his administrative remedies.

Petitioner similarly failed to advise the court of appeals of the theory he now advances. In that court, petitioner argued that the "appropriate analysis for jurisdiction of this case" should be based on 29 C.F.R. 1626.7(a), which provides that "[c]harges will not be rejected as untimely provided that they are not barred by the statute of limitations as stated in [S]ection 6 of the Portal to Portal Act of 1947." Pet. C.A. Br. 3. The court properly rejected this argument, observing that the regulations petitioner relied upon do not apply to federal employees. Pet. App. A7.

Nevertheless, the court of appeals apparently did treat the case as though it had been brought pursuant to a notice of intent to sue. See Pet. App. A6-A7. It recognized that the October 19, 1987, statement could constitute the timely notice required by Section 633a(d),[4] but then concluded that because the civil action was not instituted until almost seven months later, the notice "was not effective." Pet. App. A7.

The court of appeals did not explain that conclusion, nor did petitioner seek clarification by filing a petition for rehearing. In these circumstances – and particularly when petitioner did not present the Section 633a(d) argument to the court (the provision was not even cited in petitioner's court of appeals brief) – we submit that there is no need for this Court to accept petitioner's invitation to clarify or correct the cryptic comment in the court of appeals' unpublished opinion.

2. We do, however, agree that the court of appeals appears to have misapprehended the statutory provision relating to direct judicial review. Perhaps – like the district court (Pet. App. A3) – the court of appeals simply misread Section 633a(d), which requires that the notice be given *not less than* 30 days prior to bringing suit, and mistakenly believed that a notice of intent to sue must be given *within* 30 days of bringing suit. The notice in this case clearly complied with the 30-day requirement in Section 633a(d).

It is also possible, as petitioner now suggests (Pet. 9-14), that the court of appeals assumed that the October 19 notice was ineffective because petitioner's decision to seek administrative relief precluded him from pursuing the alternative route of direct judicial review. As petitioner asserts, the courts of appeals are divided as to whether an ADEA complainant who has elected the administrative remedy scheme can nevertheless seek judicial review under Section 633a(d) without completing the administrative process. Compare *Langford* v. *U.S. Army Corps of Engineers*, 839 F.2d 1192 (6th Cir. 1988) (claimant who seeks administrative remedies does not need to exhaust those remedies prior to bringing suit) with *Castro* v. *United States*, 775 F.2d 399 (1st Cir. 1985) (claimant, having

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within 30 days of an occurrence of age discrimination, and in fact, did not know at the time of the wrongful action that it was due to [petitioner's] age." Compl. para. 8. That allegation strongly suggests petitioner was challenging the administrative denial of his complaint, rather than relying on his notice of intent as an independent predicate for his lawsuit: the allegation was completely irrelevant to the latter approach.

[3] The administrative complaint was, however, attached to the judicial complaint.

[4] Section 633a(d) states that notice is to be given to the EEOC, and petitioner's notice is contained in his formal complaint to his employing agency. Nevertheless, EEOC treats such technically deficient notices as sufficient to satisfy the statutory notice requirement.

started administrative process, must complete it); *Purtill* v. *Harris*, 658 F.2d 134 (3d Cir. 1981) (same), cert. denied, 462 U.S. 1131 (1983).[5]

We do not, however, believe that this case involves that conflict, since petitioner *has* exhausted his administrative remedies; he obtained a final EEOC determination (albeit not on the merits) before he filed his complaint. The issue here is instead the somewhat different one of whether the election of administrative remedies precludes any subsequent resort to judicial relief under Section 633a(d).[6] Petitioner points to no conflict on that issue.

The cryptic comment of the court of appeals is not, in any event, reliable evidence that it actually addressed this issue, which, after all, was not presented to it. Because the issue was not properly presented below it may not be raised for the first time in a petition for certiorari, and the petition should be denied. Alternatively, the Court may wish to permit the court of appeals to consider that question now. In that event, this case could be remanded to the court of appeals for consideration of whether petitioner's timely filing of a notice of intent to sue not less than 30 days before instituting a civil action against his federal employer was sufficient to preserve the district court's jurisdiction over his underlying age discrimination claim, even though his efforts to obtain administrative relief were properly dismissed as untimely.

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[5] EEOC regulation 29 C.F.R. 1613.513 is consistent with the position adopted in *Langford*. It provides that "[t]he filing of a civil action by an employee or applicant involving [an ADEA administrative] complaint * * * terminates processing of that complaint." That regulation assumes that a judicial complaint may properly be filed before the administrative process is complete.

[6] We do not, however, suggest that the *Langford* analysis is inapplicable in this slightly different situation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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